SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 526

HUGHES ROBERT HILLIARD,
Petitioner and Appellant Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion in the United States Circuit Court of Appeals is reported in —— F. (2d) ——.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is the 21st day of July, 1941, as appears from page 78 of the record.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Section 347.

III.

Statement of the Case and Facts.

The case has already been stated in the preceding petition filed herewith and this statement is hereby adopted and made a part of this brief.

The Government's case rests largely upon the testimony of the witness, Stella Vaughn. If what she says be true, it must be conceded that this petitioner was guilty of a flagrant and outrageous violation of the statute in question. Briefly summarized her evidence is to the effect that sometime about the middle of the month of May, 1939, she met the petitioner in the City of Bristol, Virginia, where she had several conversations with him; that she next saw him at Marion, Virginia, presumably immediately thereafter; that at Marion he asked her to go to New York, said he had a restaurant that he wanted some girls to work in, and that she would be well protected, have plenty of money, and could come home when she got ready. While at Marion she took an automobile ride with her sister and the petitioner. Because of some difficulties which she had had at home and for fear that her mother would come to Marion after her, she left Marion and returned to Bristol, checking in at the Virginia Annex Hotel on Friday, the 12th day of May. On the night of May 12th, or during the early hours of the morning of May 13th, the petitioner also was registered at this hotel and, according to her testimony he, the petitioner, came to her room and by coercion and force induced her to leave her room and go to his, where she spent the night with him in the same bed and had intercourse with him. She testifies to no persuasion, inducement or enticement, but contends that she was influenced by fear inspired by the petitioner's threatening and menacing attitude. In effect her evidence is that she was raped by the petitioner at Bristol. About 7:00 o'clock on Friday

morning, May 13th, still acting under the petitioner's coercion, she left Bristol with him in his automobile, drove through the town of Wytheville where she lived and into the City of Roanoke. She had breakfast with the petitioner at a place across the street from the hotel in Bristol. The first place at which the petitioner stopped the automobile was at Roanoke where he gave her twenty ($20.00) dollars and she went into the Darling Shop to get a dress and some things. She remained in this store from 3:00 o'clock in the afternoon to 9:30 that night, at which time the petitioner returned. She got back in his automobile and drove to the City of Lynchburg, thence back a few miles to a tourist cabin where she spent the night with the petitioner, occupying the same cabin and bed. Early the next morning the petitioner again took her to Lynchburg where she heard him make a telephone call to the Cadillac Hotel in New York, at which time the petitioner told "Inez" and "Bobby" to meet her at the train and described her so that she could be identified. The petitioner purchased her ticket and handed it to her when the train came in. She made no stops except at Washington where she stayed about two hours between trains. She had been told by the petitioner that somebody would be at Washington watching her so she needn't try to get away. Upon her arrival in New York she was met by two women who were identified as Bobby Jensen and Inez Kelly Hilliard, the wife of the petitioner. These women immediately explained to her that she would have to lead a life of prostitution or starve and that it was best for her to begin before the petitioner's return to New York so that she would not be so dumb. She was registered in at the Cadillac Hotel by Mrs. Hilliard and the following day, Monday, May 15th, began a life of prostitution. Some two weeks after she came to New York she got sick and the petitioner who in the meantime had returned to New York City took her from the hotel

to his apartment and also to a doctor. She stayed at the apartment for about two weeks and was then taken back to the hotel where she remained until September. During all of this time she was coerced and forced into prostitution by the petitioner acting in concert with Bobby Jensen and Inez Kelly Hilliard. She turned over all of her net earnings to the petitioner. Just before she left New York the petitioner struck her with a shoe because she had left the Hotel Cadillac alone and apparently because of this incident, she enlisted the aid of a freight elevator boy named Andy, who assisted her in escaping from the hotel through the basement and back way. The petitioner had given her eighteen ($18.00) dollars to pay her room rent with and this she used for the purpose of purchasing a ticket home. Strangely enough, this was the first time that the petitioner had ever done this, her room rent having been theretofore paid by petitioner's wife. The witness contended that in all of her conduct and movements from the time the petitioner came to her room in Bristol during the early hours of May 13th to the time of her escape, she was acting under the coercion of the petitioner. She denies emphatically that she was enticed, induced or persuaded to go to New York or to enter into a life of prostitution. All of this conduct was the result of force, threats and coercion.

The witness is corroborated with respect to meeting Hilliard, first at Bristol and then at Marion. There is also evidence in the record that the petitioner was registered at the Virginia Annex Hotel on the night of Friday, May 12th. There is no corroboration of her account of what happened in the hotel or that she left Bristol with the petitioner. There is no corroboration of her statement that she was in the City of Roanoke with Hilliard, although there is evidence to the effect that Hilliard was in that City during the same hours that the witness was at the Darling

Shop. There is no corroboration of her evidence that she went from Roanoke to Lynchburg with the petitioner; that she spent the night with him in a tourist cabin; that she was put on the train by the petitioner on the morning of Sunday, May 14th; that there was any telephone call made from Lynchburg to the Cadillac Hotel. There is evidence that she arrived in New York late in the evening of Sunday, May 14th; that she went to the Cadillac Hotel and that she was at petitioner's apartment for some indefinite period of time. There is also evidence in the record from the Government witness, Dr. Berger, that Stella Vaughn did visit him in New York three (3) times, but instead of being two weeks after her arrival, the visits were on May 17th, 18th and 20th. She was suffering from gonorrhea and treated by the doctor for that disease. There is no evidence other than her own statement that she ever engaged in prostitution in New York. The Government also proved by Miss Phillips that while Stella Vaughn was in the Darling Shop she made some purchases, was apparently in a good humor, told Miss Phillips that she was going to New York to the World's Fair, seemed to be enthused about the trip, showed no evidence of any fear of anyone, but seemed to be quite worried because the person who was taking her to New York did not return for her. It appears from the evidence of J. W. Taylor that the young lady was obviously mistaken as to the time she left New York as there can be no question but what she was arrested in Wytheville, Virginia, on July 27, 1939, and must have returned home prior to that date.

The witness, Stella Vaughn, on April 10, 1940, made a written statement to John T. Cash, a special agent of the Federal Bureau of Investigation (R. 34). It appears to us that that statement differs in material respects from her evidence. In that statement she places the time of her

arrival in New York at about the middle of April, 1939; that she met Hilliard at the Virginian Hotel and that "he told me that he could take me to New York City and let me live with him until the local authorities at Wytheville, Virginia, my home town, quit looking for me, as I had had some domestic trouble at home". She admits that she had intercourse with the petitioner at the hotel in Bristol but makes no mention of spending the night with him at the tourist cabin. She says that she heard Hilliard make a telephone call to New York City and that he "told someone there to meet me at the train the next day" (R. 34). In her evidence as has been pointed out, she positively identifies the persons to whom the call was made and the directions given and she says that she arrived in New York on the evening of the same day that she left Lynchburg (R. 35). She says nothing of being induced by Inez and Bobby to engage in prostitution, but on the contrary the inference is that she stayed three days at the Cadillac Hotel until Hilliard arrived and then was registered in Room 386 and had dates with men. She makes no reference to her becoming diseased and visiting Dr. Berger. There is not the slightest intimation in this statement that she was coerced or forced into going to New York or that she was coerced into prostitution. There is not a word that suggests any fear of the petitioner or any dissatisfaction with his conduct until he beat her with the shoe in September. It is difficult to believe that a trained agent of the Federal Bureau of Investigation would have interviewed this young lady and failed to develop these significant features of her evidence if they were in fact true, or unless she had some occasion to conceal the truth. In fact, we doubt if Government Counsel believed her story in its entirety because, while in drawing the indictment they did include in the general charge that the petitioner had coerced a girl under the age of eighteen (18) years, etc., in the specification with

respect to Stella Vaughn they eliminated the word "coerce" in connection with the trip from Bristol to New York.

On behalf of the petitioner his wife testified that she first saw Stella Vaughn at the Cadillac Hotel where Miss Vaughn came to her room, told her that the petitioner and a friend of hers named "Bad Eye" told her to look Mrs. Hilliard up; that she had hitchhiked to New York for the purpose of securing medical treatment and to see the Fair while she was there. Dr. Berger, called by the Government, testified on cross-examination that at the time of her first visit to him, May 17, 1939 (three days after her arrival in New York), she had been infected with gonorrhea for a period of at least two (2) weeks.

The witness, Stella Vaughn, testified that while she was in New York engaged in prostitution at the petitioner's coercion, she wrote certain letters to her sister and her mother telling them where she was and that she wanted to come home. She said she never got an answer to any of those letters and didn't think they went out of the hotel. Whereupon, the United States Attorney in the presence of the Jury demanded that the petitioner produce these letters (R. 31-32).

Over the objection of the petitioner, Mozelle Hare was permitted to testify to statements made to her by Inez Kelly Hilliard and Bobby Jensen to the effect that they were engaged in prostitution for the petitioner (R. 41-43).

Over the objection of the petitioner the United States Attorney was permitted in his final argument to read from a paper as follows: "Miss N. E. Frazier, Service Representative of the C. & P. Telephone Company, was interviewed and it was found that in the C. & P. Telephone System that the tickets for more than six months in arrears in public telephones were destroyed" (R. 51-54), none of which was in evidence before the jury.

IV.

Specification of Errors.

1. When the Circuit Court of Appeals said on page 3 of its opinion that "In summary, it may be said that while there was abundant evidence to support the charge that Hilliard induced the girl to go to New York for immoral purposes, there was little ground for believing that she was forced into a life of prostitution" (R. 66), it in effect decided that the evidence was insufficient to convict the petitioner on the charge that he was actually convicted of, to-wit: The coercion of Stella Vaughn, a girl under the age of eighteen years to go from Bristol, Virginia, to New York City with the purpose and intent to coerce her to engage in prostitution.

2. The Circuit Court of Appeals was in error in holding that the trial judge by proper admonition to the jury cured the harmful effect of the demand made upon the petitioner by the United States Attorney to produce certain documents which were highly incriminating (R. 67-68).

3. The Circuit Court of Appeals was in error in holding that "the conduct of the United States Attorney in the closing argument when in response to a challenge of his opponent he made a statement which amounted to the giving of testimony on his part in support of the prosecution" was not prejudicial error (R. 70-71).

4. The Circuit Court of Appeals was in error in holding that the admission of the testimony of a colored maid was harmless and not prejudicial (R. 74-75). This evidence was to the effect that two women (neither of whom was Stella Vaughn) both told this colored maid "that they were engaged in prostitution in the employment of the defendant" (R. 41-43).

5. The Circuit Court of Appeals was in error in holding that the petitioner was not prejudiced by the refusal of the trial court to give instructions "b", "d", "i" and "j" tendered by the petitioner (R. 76-77).

V.

ARGUMENT.

Point 1. It is true that the indictment charged that the petitioner did persuade, induce and entice and coerce a girl under the age of sixteen years from the State of Virginia to the State of New York with the purpose and intent to induce and coerce her and that she should be induced and coerced to engage in prostitution and debauchery (R. 2). The Circuit Court of Appeals, after outlining the evidence of Stella Vaughn, who was the chief prosecuting witness, says:

> "In summary, it may be said that while there was abundant evidence to support the charge that Hilliard induced the girl to go to New York for immoral purposes, there was little ground for believing that she was forced into a life of prostitution" (R. 66).

This excerpt from Judge Soper's opinion is supported and borne out by a written statement made by Stella Vaughn to Government Agent John T. Cash at Wytheville, Virginia, April 10, 1940 (R. 34).

However, if one examines her evidence as given at the petitioner's trial, it is apparent that she denies that she was induced or enticed to go from Bristol to New York and claims to the contrary that she was forced and coerced into this trip and forced into a life of prostitution. If Judge Soper is of the opinion that there was little ground for believing that she was so forced and coerced, then he must disbelieve the substantial elements of Stella Vaughn's testi-

mony on which petitioner was convicted. If there be no coercion and force, then Stella Vaughn's testimony is utterly unreliable and should be discarded from the case. If it be so discarded, there is not a particle of evidence from any other source that Stella Vaughn was coerced or forced to go to New York and forced into prostitution. There is no evidence of the fact that she was ever induced, persuaded, or enticed to make the trip or enter into a life of prostitution. A simple reading of the record will convince anyone of this fact.

Point 2. The question here raised is as to the action of the United States Attorney in demanding of the petitioner that he produce certain letters claimed by Stella Vaughn to have been written by her to her sister and mother at a time when according to her statement she was for all practical purposes a prisoner of the petitioner. She testified that in these letters she "told them where I was at and that I wanted to come home". But she further said that she got no answers to her letters and didn't think they ever went out of the hotel (R. 31-32). Whereupon, the United States Attorney interrupted the examination and said in the presence of the Jury:

> "I want to call for the production of those letters if you have them. I ask if they have the letters they produce them in Court. I am not saying Counsel has them. I am including the defendant" (R. 31-32).

One of petitioner's counsel replied:

> "I ask that the District Attorney produce the letters if he has them" (R. 32).

Whereupon, the United States Attorney said:

> "I don't have them" (R. 32).

Petitioner's counsel did not immediately direct the court's attention to this improper conduct of the United States At-

torney but shortly thereafterwards, while the same witness was under cross-examination, counsel for the petitioner did move for a mistrial because of this action of the United States Attorney, which motion was overruled and an exception taken. Immediately thereafterwards the court thus charged the jury:

> "Gentlemen of the jury, there was some mention made of letters which the witness wrote home. I will say to the jury the demand of the District Attorney on the defendant and the demand on the District Attorney by the defendant—you gentlemen are not to draw any inference that either the Government or the defendant or both, had the letters, or the other. Each side requested the other to produce them and they said they didn't have them and you are not to draw any inference that either side ever had them" (R. 32).

The opinion of the Circuit Court of Appeals admits that it is improper for the prosecuting attorney in the presence of the jury to demand that a defendant produce an incriminating document (R. 68). The opinion further admits that in the pending case the possession of such letters as were referred to by Stella Vaughn would have been weighty testimony against the petitioner (R. 68). But the opinion says that "the incident was closed without exerting any compulsion upon the defendant and without prejudice to his case" (R. 68); this because "the jury was promptly told by the judge that there was nothing to show that the defendant ever had the letters" (R. 68). We do not so read the trial judge's admonition to the jury. The admonition told the jury that there had been some mention made of letters which the witness wrote home; it referred to the demand of the district attorney on the petitioner and the demand on the district attorney by the petitioner; it told the jury that they were not to draw any inference that either the Government or the petitioner had the letters and

it further told them that each side had requested the other to produce the letters and each side said they didn't have them and that the jury was not to draw any inference that either side ever had them. We do not agree that this goes to the extent of telling the jury "that there was nothing to show that the defendant ever had the letters". Our contention is that the admonition of the court in this case falls far short of what was properly required to dissipate the baneful influence of the United States Attorney's conduct. It must be remembered that counsel for the petitioner had a right to demand of the Government that it produce the letters if in its possession, but the United States Attorney had no such right (this by unanimous authority of all American cases). He made it clear that his demand was not only of counsel for the petitioner but of the petitioner himself. There was only one possible way in which the petitioner could repel the evil suggestion and that was to take the witness stand and deny that he had the letters, thereby subjecting himself to cross-examination. This would indirectly have forced the petitioner to testify and, certainly he has a right not to do so. While we are not in accord with the theory of some of the cases which hold that such conduct may be cured by proper admonition of the court, the court at least could have helped the situation in the present case. Had he rebuked the United States Attorney for his conduct, told the jury that the petitioner was under no duty to produce documents or papers in his possession, and that it was immaterial whether he had them or not and that they should disregard the demand upon him, then it is possible that such a statement to the jury might have been effective and avoided the prejudice done to the petitioner. But this was not done. The Court treated the Government and the petitioner alike. He never intimated to the jury that the demand of the United States Attorney was improper. In effect he said to them: "Gentle-

men, the District Attorney has asked the defendant to produce these letters and the defendant has asked the District Attorney to produce them. Both say that they haven't got them, so you are not to draw any inference from the respective requests". The jury must have been left under the impression that if the petitioner in fact did have the letters, it was the right of the United States Attorney to demand that he produce them. The jury is left under the impression that Hilliard, the prisoner in the dock, and Mr. Tavenner, the United States Attorney, both deny that they have the letters. Because of those denials we must draw no inference that either one has them. As a practical matter, the jury would be of course inclined to accept as true Mr. Tavenner's statement because of their confidence in his integrity, and more than likely inclined to refuse to accept the petitioner's statement. The court's action in basing his admonition to disregard the demand because both sides denied possession of the letters was of little value to this petitioner. If they had been told that Mr. Tavenner, honorable gentleman that he is, had nevertheless exceeded his rightful powers, had been guilty of misconduct in making such a request, had violated the petitioner's constitutional right by so doing, and that regardless of whether the petitioner had the letters or not, or regardless of what the jury believed with respect to this, they ought not to consider the demand, then perhaps the error would have been cured. As we see it, however, the admonition given by the court falls far short of any that has ever been held sufficient to render such an error harmless. The legal question involved is discussed and exhaustively annotated in 110 A. L. R. 101. The annotation follows the reported case of *Powell* v. *Commonwealth*, 167 Va. 558, 189 S. E. 433, 110 A. L. R. 90. The annotator asserts:

> "The American decisions are almost unanimous in support of the proposition that in the trial of a crimi-

> nal case it is improper for the prosecuting attorney or the court in the presence of the jury to call upon the defendant or his counsel to produce a document as being in his possession."

The cases cited to support the statement are too numerous to be here repeated. The leading case on the subject is *McKnight* v. *United States* (C. C. A. 6; 1902), 115 Fed. 972. The court which decided this case included two judges who were afterwards members of the Supreme Court of the United States. The opinion was by Circuit Judge Day, afterwards Mr. Associate Justice Day. The *McKnight* case has been followed universally by both Federal and State courts, although subject to severe criticism by a distinguished text writer. The decision is based upon the constitutional right of a defendant to remain silent and not be compelled to give testimony against himself. Although unanimous on the proposition that such conduct upon the part of the prosecuting officer is improper, there has been some diversity of opinion as to when such conduct requires a reversal. Some cases have held the error harmless where the document called for was not in fact incriminating. This rule certainly cannot be applied in the present case. If it were true that the witness had written letters to her mother and sister telling them where she was and that she wanted to come home and those letters were in the possession of the petitioner, having been intercepted by him, this would have been utterly damning to his cause. It would have tended to corroborate her testimony that she was practically in the custody of the petitioner in New York City for several months, a circumstance so significant and incriminating as to have destroyed any hope that a jury would hesitate for a moment to render a verdict of guilty. Other cases have held that where the court promptly rebukes and condemns the conduct of the prosecuting attorney and "by appropriate instructions does everything pos-

sible to neutralize the prejudicial effect which may have resulted * * * the question whether the defendant was substantially prejudiced by the objectionable demand is of course one to be decided with reference to the particular circumstances of the case". 110 A. L. R. 114, citing *Bane* v. *United States* (C. C. A. 6; 1920) 262 F. 664. We direct attention to the following cases:

Hibbard v. *United States* (C. C. A. 7; 1909), 96 C. C. A. 554, 174 F. 66, 18 Ann. Cas. 1040.
Green v. *United States* (C. C. A. 8; 1920), 266 F. 779.
Rocchia v. *United States* (C. C. A. 9; 1935), 78 F. (2d) 966.

We particularly point out that in the *Green* case when a demand was made on Green's attorneys to produce a certain letter, the court promptly said:

> "That will not be permitted. The jury will not consider that demand at all. It is not justifiable or permissible in a criminal case to ask any evidence of the defendant". (266 F. 781.)

And then, further, the court said:

> "The fundamental law in this country is that no man can be required to be a witness against himself, and it infringes that rule to ask at the trial for any document defendant possesses, even of his counsel. Therefore, the exception is well taken * * * and you will not give any consideration to it at all, but disregard it altogether and be sure you take it out of your minds". (266 F. 782.)

In the *Rocchia* case the court's admonition to the jury was as follows:

> "I want you to understand that the defendant is not compelled to produce anything against himself, even if

> demand is made upon him, in a criminal action. In your consideration, bear that in mind, that the defendant is not required, nor expected, nor can you assume, anything against him because he has not produced, if he has them—there is nothing to establish that he has them at the present time—any documents which might have been desired by the Government to be produced, if they did so desire, to have them produced". (78 F. (2d) 971.)

The only authority relied upon by the Circuit Court of Appeals for its holding with respect to this matter is *Bane* v. *United States,* (C. C. A. 6; 1920) 262 F. 264. We wish to point out the admonition given to the jury in that case, as follows:

> "Under the constitutional right of defendant, that notice (to produce original checks and drafts) should not have been given, and the court was in error in making the suggestion and permitting the notice to be given in your presence, and that action is withdrawn. That notice goes for nothing. You are not to draw any inference as to whether the defendant has or has not these vouchers in his possession. There is no inference to be drawn against him, if it appears that he does not produce them later in the trial. The government proceeds to prove its case and (the defendant was not required to make the production) and no inference whatever is to be drawn from his failure to do so. You understand that. Expunge that matter from your minds as though you had not heard it." (2 62 F. 666-667.)

We submit that wherever any Circuit Court of Appeals has held that such a demand as was made of the petitioner in this case was harmless error, there appeared a definite admonition to the jury that the defendant's constitutional rights had been violated by such demand. The juries were told that regardless of whether he had possession of the documents or not, he was under no duty to present them.

Nowhere can we find any Federal case, or for that matter any case decided by any of the State courts in America, that has held that an admonition is sufficient which merely tells the jury that inasmuch as both defendant and the District Attorney have denied possession of the documents, the jury is not to draw any inference that either is in possession of same. This was the effect of the trial judge's admonition in the present case.

Point 3. The opinion of the Circuit Court of Appeals seems to agree with counsel for the petitioner that the United States Attorney in his closing argument "made a statement which amounted to the giving of testimony on his part in support of the prosecution" (R. 70).

In his closing argument to the jury the United States Attorney was permitted to read from a memoranda in his possession the following:

> "Miss N. E. Frazier, Service Representative of the C. & P. Telephone Company, was interviewed and it was found that in the C. & P. Telephone System that the tickets for more than six months in arrears in public telephones were destroyed" (R. 71).

The significance of the memoranda is plain. Stella Vaughn had testified to overhearing a telephone conversation between the petitioner and two persons in New York whom he called "Inez" and "Bobby". The Government had made no effort to introduce any record of this call and made no effort during the taking of evidence to explain its failure so to do. It is true that one of Counsel for the petitioner during the course of his argument challenged the United States Attorney to explain his failure in this respect and the court permitted the memoranda referred to to be read to the jury over the strenuous objection of the petitioner upon the theory that the United States Attor-

ney had a right to reply to that challenge. We insist that this cannot be sound. Counsel's challenge, of course, was to answer the question from the record. He did not conceive that the United States Attorney would be permitted to take the role of a witness and testify to an important fact if true, based not upon his own knowledge but obviously from a report made to him by a Government agent, who in turn had secured his information from still a third person. The accuracy of Counsel's statement to the jury is, therefore, dependent not only on his own truthfulness and reliability, but upon that of the Government agent who made the report and of the person who gave the information to such agent. If it be the law that when the prosecuting attorney fails by proper evidence to show some material fact and Counsel for a defendant comments upon his failure and asks him to say why it was not done, that in such case the prosecuting attorney is at liberty to put before a jury statements of this character, then we say that the way is open for the perpetration of the most outrageous injustice. Let us assume that a man is being tried for murder; that the evidence is entirely circumstantial and, therefore, one in which the question of motive becomes highly important for the purpose of identifying the accused as the guilty agent. The prosecuting attorney sits idly by, makes no effort to show any motive during the taking of the evidence. Then let us assume that defendant's counsel properly brings this fact to the attention of the jury and asks the prosecutor to state why he hasn't introduced such evidence. Then let us assume that we have a corrupt prosecuting attorney who during the course of his final argument goes into his private papers and produces a letter from a dead person in which letter it is stated that the defendant admitted to such person a strong motive to kill the deceased. Would any court permit him to read such a letter in reply to a challenge of this character and say the person would have been here

to have testified to it if he were not dead? The entire letter may have been an outrageous forgery. The prosecuting officer may have deliberately brought about the situation to avail himself of such illegal evidence.

In holding that there was no error in the action of the Court in permitting the District Attorney to go entirely outside of the record and state that on a certain day "Miss N. E. Frazier was interviewed and it was found that in a C. & P. Telephone system that the tickets for more than six months in arrears in public telephones were destroyed", the only reasons assigned for such a decision is an implication that the challenge made by Counsel for the defense cannot be commended and that the process of the court to secure the production of the Telephone Company records was easily available to the defense (R. 71). If we understand this holding, it is to the effect that a defendant may be convicted upon evidence given in the argument by the United States Attorney when that gentleman is not under the obligation of an oath. Such evidence may be given during a closing argument under such circumstances as denies to the defendant the right to cross-examine or to refute the evidentiary matter, if that be possible. Further, this evidence may be third-hand hearsay as in the present case. Thus a defendant's constitutional rights may be violated and ignored merely because the defendant or his counsel has failed to secure evidence with respect to an incident that first came to their attention during the course of the trial. These constitutional rights may be ignored if counsel for the defendant makes a natural inquiry as to why important evidence has not been presented by the government. We do not agree that this is a logical holding and we suggest that it is in the teeth of the spirit of the decisions in *Sunderland* v. *United States,* (C. C. A. 8; 1927) 19 Fed. (2d) 202; *Taliaferro* v. *United States,* (C. C. A. 9;

1931) 47 F. (2d) 699; *Pierce* v. *United States,* (C. C. A. 6; 1936) 86 F. (2d) 949.

Point 4. The opinion of the Circuit Court of Appeals definitely holds that the trial court was in error "in admitting over the defendant's objection the testimony of a colored maid employed at the hotel in New York to the effect that Inez Kelly and Bobby Jensen both told her that they were engaged in prostitution in the employment of the defendant" (R. 74-75). The Circuit Court of Appeals further says that:

> "The evidence of the maid in the pending case, however, indicates that the declarations of the girls objected to were merely casual descriptions of their occupation and the defendant's participation therein, and were not made in the course of the commission of the crime in order to promote or further its accomplishment. The declarations, therefore, were not saved from the hearsay rule by the principle of the cited cases". (R. 75)

However, the Circuit Court of Appeals holds that this error of the trial court was not prejudicial to the petitioner. (R. 75) It bases this holding upon the statement that "no one can read the entire evidence in this case and harbor any reasonable doubt as to the occupation of these women". (R. 75) This may be true, but certainly there is nothing else in the record to show that these women were prostituting themselves for the petitioner except, possibly the evidence of Stella Vaughn. The vice of the colored maid's testimony and its harmful effect so far as the petitioner is concerned was not her testimony as to the admission of the two women that they were prostitutes, but her evidence that they were prostitutes in the employ of the petitioner. (R. 41-43) It is difficult for us to conceive of how any evidence could be more prejudicial. The petitioner was being

tried on a charge of coercing the girl to go from Virginia to New York with the intent that she should be coerced into prostitution. (R. 2) The Circuit Court of Appeals says that "there was little ground for believing that she was forced into a life of prostitution". (R. 66) It is true that the Circuit Court of Appeals says, "There was abundant evidence to support the charge that Hilliard induced the girl to go to New York for immoral purposes". (R. 66) We say that there is not a line in the record which supports such a charge, but on the contrary the charge is specifically denied by the prosecuting witness, Stella Vaughn. Faced with such a charge the Government is permitted to introduce a hearsay statement to the effect that two other women were in the employ of the petitioner as prostitutes in the City of New York. (R. 41-43) It is not conceivable to us that such evidence could fail to prejudice petitioner's cause.

Point 5. The petitioner insists that the Circuit Court of Appeals was in error in holding that the trial court was not in error in its failure to give his requested charges "b", "d", "i" and "j". Requests "b", "i" and "j" appear in the printed record. (R. 14-15) By inadvertence request "d" was not printed. It is as follows:

> "The Court tells the Jury that under the facts and circumstances of this case they should scrutinize the evidence of the witness, Stella Vaughn, with care and caution".

It seems to us that the failure to charge as thus requested is in the teeth of *Speiller* v. *United States,* (C. C. A. 3; 1929) 31 F. (2d) 682. In that case the witness with respect to whom the charge should have been given had lived an immoral life and had committed perjury. According to the admission of Stella Vaughn she was unchaste at the time she met Hilliard. (R. 66) According to the testimony of Nannie Tate she led an immoral life thereafterwards and ac-

cording to the affidavit which Stella Vaughn made at the time of procuring her marriage license, she had committed perjury.

Request "i" is in the exact language as the request made in the case of *Bruno* v. *United States* (1939) 308 U. S. 287, 60 S. C. R. 198, 84 L. Ed. 257. The *Bruno* case was reversed because the substance of the denied request was not granted. We insist that what the Court did say in his charge is not substantially in compliance with the request made in the *Bruno* case because it does not tell the jury that the failure of the petitioner to testify should not "enter into the discussions or deliberations of the jury in any manner".

Instructions "b" and "j" were based upon the petitioner's theory of the case and were not covered in the charge at all. With respect to request "b" it must be remembered that Stella Vaughn told Miss Phillips that she was going to New York to the World's Fair. It must be remembered that she told Inez Kelly Hilliard that she came to New York for medical treatment and to see the Fair. It must be remembered that in her statement made to Officer Cash in April, 1940, she made no claim that she had been induced, enticed, persuaded or coerced to go to New York from Virginia. (R. 34-36) In other words, the jury might very well have believed the facts set out in this instruction. If so, the petitioner was entitled that the jury be told that he was entitled to an acquittal upon those facts. The same is likewise true of request "j".

Little v. *United States* (C. C. A. 10, 1934), 73 F. (2d) 861, 96 A. L. R. 889;

Meadows v. *United States* (D. C. C. A., 1936), 82 F. (2d) 881;

McAffee v. *United States* (D. C. C. A., 1939), 105 F. (2d) 21.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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